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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5271

LENIX STELLY,

Appellant,

versus

QUICK MANUFACTURING COMPANY, ET AL,

Appellees.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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TO THE HONORABLES, THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

For the reasons hereafter set forth, appellees pray that this honorable Court refuse the writ of certiorari sought by petitioner.

STATEMENT OF THE CASE

Petitioner sustained an accident during his employment as a janitor at a Louisiana elementary school. He was operating a riding lawn mower when an accident allegedly occurred. Thereafter he sued the man-

OPPOSITION BRIEF

ufacturer of the riding mower under a products liability theory and four doctors, a general surgeon, a general practitioner, a urologist and a neurosurgeon, for medical malpractice. The jury returned a verdict against the mower manufacturer despite uncontradicted evidence that only a few days before the accident it was found that the mower had worn out and an entire new engine had been installed on the machine by a local hardware dealer.

The Louisiana Court of Appeal reviewed the case, determined that there was no evidence to support the jury verdict and reversed the decision. A rehearing was denied and a writ application by petitioner to the Louisiana Supreme Court was refused with a statement that there was no error of law in the judgment. The appellate decision details the facts of the case. (See Appendix A of petitioner's writ application).

QUESTION PRESENTED

The sole question presented by petitioner's application for writs of certiorari is as to whether or not the appellate review of the findings of a civil jury is a violation of the United States Constitution, specifically a violation of Amendment 7 of said Constitution and the due process clause of the 14th Amendment.

REASONS FOR REFUSING WRIT OF CERTIORARI

A. The Seventh Amendment to the United States Constitution is not applicable to the States.

It is respectively submitted that the State Court Appellate review of facts in a case where trial by jury in a civil case has taken place in the lower Court is neither a violation of the United States Constitution, nor a violation of the Seventh or Fourteenth Amendments thereof.

The Seventh Amendment of the United States Constitution is not applicable or controlling as to the States. Chief Justice John Marshall in 1833 rendered a decision in the case of *Barron v. Baltimore*, 32 U.S. 243, 7 Pet. 242, 8 L.Ed. 672 (1833), holding that the first ten amendments to the United States Constitution were limitations on the powers of the Federal Government and that these amendments were not applicable to the States. Later with the passage of the Fourteenth Amendment and the decisions pursuant thereto, the aforesaid decision was somewhat modified. The modification, however, was to the effect that a state could not deprive a person of a fundamental right secured by the United States Constitution. Despite the adoption of the Fourteenth Amendment, and its ramifications, in 1875 the United States Supreme Court decided the case of *Walker vs. Sauvinet*, 92 U.S. 90 (2 Otto 678) (1875), which case for the first time considered the applicability of the Seventh Amendment and its relationship to the States. Chief Justice Waite declared in the decision of this case:

> "The states, so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of na-

> tional citizens, which the states are forbidden by the Fourteenth Amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. The requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings." (Page 679.)

The Supreme Court has thus held that due process of law is fulfilled if a trial is had according to the settled course of judicial proceedings. The Court by this decision determined that all trials in State Court do not have to be trials by jury. The power to eliminate entirely trials by jury in civil state court proceedings certainly encompasses the right of the state to regulate and put such qualifications as it deems necessary on civil jury trials.

Louisiana has put certain qualifications on civil jury trials and has consistently through the years provided that appellate courts may review fact as well as law. It was in 1816 that Francis Xavier Martin first announced this principle in the case of *Abat vs. Doliolle*, 4 Martin (O.S.) 316 (1816).

We submit that this procedure has now for over 100 years provided a fair and impartial judicial process which in no way has been, or is today, in violation of the Seventh Amendment of the United States Constitution or the due process clause of the Fourteenth Amendment.

The *Walker* case, supra, was and still is a controlling case as to the applicability of the Seventh Amendment of the United States Constitution to the States. That case unequivocally held that the States are to regulate trials in their own courts, as they see fit.

At no time has it ever been held or decided that the Seventh Amendment of the United States Constitution is applicable to the States.

In further support of the proposition that the Seventh Amendment is not applicable to the States, we point out that in 1916 the United States Supreme Court was confronted with the proposition that the denial of a trial by jury in a state workmen's compensation suit was a denial of the protection of the Seventh Amendment. In that case, *New York Central R.R. Co. vs. White*, 243 U.S. 188, 61 L.Ed. 667 (1917), the Court held:

> "No question is made but that the procedural provisions of the Act are amply adequate to afford the notice and opportunity to be heard required by the Fourteenth Amendment. The denial of a trial by jury is not inconsistent with 'due process'. Walker vs. Sauvinet, 92 U.S. 90, 23 L.Ed. 678; Frank vs. Mangum, 237 U.S. 309, 340, 59 L.Ed. 960, 985, 35 S.Ct. Report 582." (page 677.)

This type of trial without jury was held to be consistent with due process and clearly indicates that the right to trial by jury in state court civil cases is not obligatory. It is noteworthy that the *Walker* case, supra, was cited in support of the Court's decision in the aforesaid case.

Importantly, in 1931, in the case of *Hardware Dealers' Mutual Fire Insurance Company vs. Glidden Company*, 284 U.S. 151, 76 L.Ed. 214 (1931), the Court declared as follows:

> "The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. See Missouri, Ex Rel Hurwitz vs. North, 271 U.S. 40, 70 L. Ed. 818, 46 S.Ct. 384. In the exercise of that power and to satisfy a public need, a State may choose that remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard." (Page 158.)

This case certainly supports the position of appellees herein that the Seventh Amendment under the due process clause of the Fourteenth Amendment does not apply to the States and that the States have full discretion as to their procedure in civil cases.

One of the most recent cases wherein a petitioner contended that he was denied his constitutional rights under the Seventh Amendment to the United States Constitution is the 1957 decision of *Olesen vs. The Trust Company of Chicago*, 245 F.2d (7th Cir. 1957). The Court in that case concluded that:

> "It is clear there is no Federal question involved in the case at bar. The Seventh Amend-

ment of the United States Constitution applies to trials in the United States courts. Bute vs. People of State of Illinois, 333 U.S. 640, 657 (footnote), 68 S.Ct. 763, 92 L.Ed. 986. Trial by jury in civil actions in state courts may be modified by a state or abolished altogether. Walter vs. Sauvinet, 92 U.S. 90, 23 L.Ed. 678; Maxwell vs. Dow, 176 U.S. 581, 20 S.Ct. 494, 44 L.Ed. 597; New York Central R.R. Co. vs. White, 243 U.S. 188, 208, 37 S.Ct. 247, 61 L. Ed. 667; Wagner Electric Manufacturing Company vs Lindon, 262 U.S. 226, 232, 43 S.Ct. 489, 67 L. Ed. 961.

A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. 'The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure.' Hardware Dealers Mutual Fire Insurance Company of Wisconsin vs. Glidden Company, 384. U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214." (Page 524)

The aforesaid holding it is submitted merely reiterates and reaffirms the contentions of appellees herein that consistently for approximately 100 years the United States Supreme Court and the Federal Circuit Courts of Appeal have held that the Seventh Amendment of the United States Constitution does not apply to the States even under the due process clause of the Fourteenth Amendment and that the trial by jury in civil cases may be modified or even obliterated as the state sees fit.

It is extremely important to note that this honorable Court has very recently considered the right of the Louisiana Courts of Appeal to review the findings of fact of a jury and it has evidently concluded as did Justice Waite in the *Walker* case, supra, that the States are free to regulate civil trials and judicial proceedings in their own way and that the review of the findings of fact by a civil jury in a state court proceeding is not a violation of the Seventh Amendment of the United States Constitution or the due process clause of the Fourteenth Amendment.

Since 1966 this Court has had the same question presented, i.e., whether the Constitution has been violated due to the right of the Louisiana Courts of Appeal to review the findings of fact of a civil jury, and at least three times this Court has by denying the application for writs of certiorari in the following cases concluded that the Louisiana procedure was not in violation of the United States Constitution, specifically the Seventh Amendment. *Sule vs. Missouri Pacific Railroad Co.*, 385 U.S. 819, 87 S.Ct. 46 (1966); *King vs. Vico Insurance Company of St. Louis*, 385 U.S. 841, 87 S.Ct. 90 (1966); *Broussard vs. State Farm Mutual Automobile Insurance Company*, 386 U.S. 909, 87 S.Ct. 855 (1967).

The precise issue at bar was presented to this Court in 1969 by the attorney for appellant in the matter of *Marie Richard v. Travelers Insurance Co.*, et al, 396 U.S. 824, 90 S.Ct. 67 and writs were denied by this Court. See also *Mayes v. McKeithen*, 396 U.S. 868, 90 S.Ct. 108.

By denying the aforesaid writs, it is submitted that this honorable Court has evidently once again concluded that the past jurisprudence holding that the Seventh Amendment to the Constitution of the United States does not apply to the States was and still is correct.

B. Louisiana Appellate review of facts is not a violation of the Seventh Amendment.

Now alternatively, and assuming for the sake of argument, that the Seventh Amendment of the United States Constitution does apply to the States, then the writ sought herein should be denied since the Louisiana Appellate review of facts is not a violation of the Seventh Amendment.

The Seventh Amendment to the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." U.S.C.A. Constitution Amendments 6 to 14, p. 134.

In the Seventh Amendment itself, even as it applies to the Federal Courts, a provision is made therein for a review of facts tried by jury. True there are certain limitations on this review of fact, but such a review is not only contemplated but is provided for and used by the Federal courts.

We must not lose sight of the fact that this application for writs in the case at bar involves a civil case as distinguished from a criminal proceeding. The Sixth Amendment to the United States Constitution as distinguished from the Seventh, deals with criminal cases and is totally void of any language or provision for a review of facts found by a jury. Thus clearly the contemplated mode of procedure in civil and criminal jury cases is different.

Petitioner in his application for writs of certiorari herein, attempts to make it appear that a jury trial should have such sanctity that under no circumstances should the jury's findings be disturbed. It is contended that the Louisiana procedure which provides for a review of facts in a jury trial is a foreign idea to the jury system and that the realm of the jury is being invaded by our Louisiana Courts of Appeal. This suggestion is definitely incorrect since the Seventh Amendment itself provides for a review of facts in a civil jury trial.

For a moment let us consider the various safeguards which Louisiana by its codes and jurisprudence has placed on the courts involving civil juries.

Article 1792 of the Louisiana Code of Civil Procedure states:

> "In his charge to the jury the judge shall instruct the jurors on the law applicable to the cause submitted to them, but he shall not recapitulate or comment upon the evidence so as to exercise any influence upon their decisions as to the facts."

Thus, the trial court judge in Louisiana has no influence at all as to the jury's decision.

In addition to the foregoing protection with reference to the sanctity of civil jury trials in Louisiana, the courts themselves have placed severe restrictions on their age old right to review the facts.

Under the Louisiana Civil Code, Article 1934 (3), it is provided that:

> ". . . in cases of offenses, quasi offenses and quasi contracts, much discretion must be left to the judge and jury ...."

The Louisiana courts have consistently and repeatedly held that the findings of fact of a jury will not be disturbed unless there is a clear abuse of the large discretion vested in the jury. *Gaspard vs. Lemaire,* 245 La. 239, 158 So.2d 149.

There are also strict guidelines set by the courts as to when the jury has abused its discretion in respect to the amount of an award given. The abuse of discretion in a personal injury suit with respect to quantum is to be determined by the Courts of Appeal by a fair analyzation of the injuries of the plaintiff, and the medical testimony in relation thereto. Only after a careful review of the facts and circumstances of a case can the Courts of Appeal determine if there was an abuse of discretion on the part of the jury. *Winfree vs. Consolidated Underwriters,* 169 So.2d 71; *Barlow vs. Plummer,* 195 So.2d 321.

In the case at bar the Third Circuit Court of Appeal in and for the State of Louisiana followed the aforesaid guidelines and concluded that the verdict of the jury was erroneous and that it constituted a clear abuse of the large discretion vested in the jury. This finding of abuse of discretion was established by the review of the entire record in the case.

The protections afforded a civil jury trial under the Louisiana procedure affords equal or greater protection to the province of the civil jury than is given to said body by the Federal system. Even in light of the definite applicability of the Seventh Amendment of the United States Constitution to the Federal courts, it is within the province of the trial judge in a Federal District Court to assist the jury by commenting upon the evidence and by drawing the jury's attention to the parts the judge thinks are important. The judge may even express his opinion upon the facts provided that he makes it clear to the jury that all matters of fact are to be decided by that body. *Quercia vs. United States*, 289 U.S. 466, 53 S.Ct. Reports 698 (1933); *United States vs. Garber*, 383 F.2d 448 (1967).

Clearly the aforesaid invasion into the realm of the jury by the trial judge must have a profound effect on the jury's ultimate decision. This prerogative of the Federal court district judge would according to petitioner herein be violative of the right to trial by jury as contemplated by the Seventh Amendment to the United States Constitution. We submit that this right of the Federal court trial judge is a mere safeguard to protect the rights of all parties.

As previously pointed out, this right is not afforded to the Louisiana district judge.

In addition to the foregoing, it is also within the power of the Federal district judge to sustain a motion for directed verdict at the close of the plaintiff's evidence or at the close of all of the evidence. If such a motion is sustained or granted, the court may consider granting a new trial. The Federal district judge may also grant a judgment notwithstanding a verdict rendered and may enter judgment as if a verdict had been directed. *Federal Rules of Civil Procedure*, Rule 50.

The aforesaid rights of the Federal district judge provide a much greater limitation on the trial by jury in civil cases than does the restricted appellate review of facts allowed in Louisiana. The aforesaid rights of the Federal district judge have repeatedly been found to be consistent with the provisions of the Seventh Amendment and its protection to the people from Federal encroachment on their rights. A Louisiana district judge does not have the right to direct a verdict or enter a judgment notwithstanding the verdict.

Not only has the Federal system given the district judge a large measure of control over civil jury trials, but is is submitted that the Federal courts of appeal are also given the power to alter the findings of civil juries.

In the case of *Neely vs. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 87 S.Ct. 1072 (1967), the question presented was whether a Federal appellate court could

constitutionally, in light of the Seventh Amendment, grant a judgment n.o.v. and direct the trial court to dismiss the action after a jury trial. The Supreme Court held that this did not infringe on the Seventh Amendment's grant of a right to trial by jury and stated as follows:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v." (Page 1076)

Certainly the constitutional right of the Federal Court of Appeal to grant a judgment n.o.v. is broad enough and would encompass the self restricted right of the Louisiana State Court of Appeal to review the facts found by a jury.

Even with respect to a jury's award in quantum, we submit that this can also be reviewed and changed by the Federal Courts. In 1967 this Court decided the case of *Curtis Publishing Company vs. Butts*, 388 U.S. 130, 87 S.Ct. 1975 (1967). In that case Butts filed suit in Federal Court and the jury awarded $60,000.00 in general damages and $3,000,000 in punitive damages. The trial court reduced that award to $460,000. Motion for new trial was filed by Butts and denied. The Fifth Circuit Court of Appeal affirmed the decision of the lower court and certiorari was granted. Heard at the same time was the consolidated case of *Associated Press vs. Walker*. Walker was awarded by a Texas

state court jury $500,000 in compensatory damages and $300,000 in punitive damages. The trial judge found no evidence to support the punitive award, and reduced the jury verdict to the compensatory award given. This case went through the Texas courts and was brought to this Court on writs of certiorari.

As to the *Walker* case, supra, this Honorable Court even went further than a reduction of the award and completely disallowed the already reduced award which had been given.

With respect to the *Butts* case, supra, this honorable Court affirmed the Federal district judge's reduction in quantum clearly signifying that this is a power allowed to the Federal courts and was not in violation of the Seventh Amendment of the United States Constitution.

We feel that it is significant to point out that this honorable Court stated in deciding the *Butts* case, supra, that:

> ". . . . The Constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts, manifested in this instance by the trial court's remittitur . . . . . " *Curtis Publishing Company vs. Butts*, 87 S.Ct. 1975, page 1994.

In Louisiana, with our appellate review of facts, we are merely exercising the rights which the Federal courts have under the Seventh Amendment and are safeguarding the rights of our citizens by having judi-

cial control over erroneous jury verdicts. In the case at bar this was manifested by the Third Circuit Court of Appeal's reversal in the jury award where it found that the overwhelming evidence reflected that the jury had clearly abused its wide discretion.

SUMMARY

It being determined that the Seventh Amendment of the United States Constitution does not apply to the States, it becomes self-evident that the appellate review of facts in jury trials by the Louisiana Courts of Appeal is not in violation of the United States constitutional guarantees to civil jury trials.

Alternatively, and if it is found that the Seventh Amendment does apply to the States, then it is quite apparent that the protections afforded by the Seventh Amendment to the United States Constitution are more carefully and stringently guarded by the Louisiana court procedure than by the Federal Court procedure and its practices.

CONCLUSION

It is, therefore, respectfully submitted that the appellate review of the facts by the Louisiana Courts of Appeal is not in violation of the United States Constitution or the Seventh or Fourteenth Amendments thereof, and that the writs of certiorari prayed for by petitioner herein should be denied.

Respectfully submitted,

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CERTIFICATE

I, JAMES J. DAVIDSON, JR., counsel for defendants, and a member of the Bar of the United States Supreme Court, hereby affirm that a copy of the foregoing brief in opposition to granting of writs of certiorari has been served on the parties hereto by mail, in a properly addressed envelope, postage prepaid as follows, to-wit:

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Clerk Louisiana Supreme Court,
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Mr. J. Minos Simon,
P. O. Box 52116 OCS
Lafayette, Louisiana.
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Lafayette, Louisiana, this ____ day of September, 1971.

JAMES J. DAVIDSON, JR.